APPENDIX A

31 C.F.R. § 315.0, et seq.

"§ 315.0 *Applicability of regulations.* The regulations in this part apply generally to all United States Savings Bonds of all series of whatever designation, bearing any issue dates whatever, except as otherwise specifically provided herein."

"§ 315.5 *General.* United States Savings Bonds are issued only in registered form. The form of registration used must express the actual ownership of and interest in the bond and, except as otherwise specifically provided in Subpart E and § 315.48 of Subpart I of this part, will be considered as conclusive of such ownership and interest. • • •"

"§ 315.7 *Authorized forms of registration.* Subject to any limitations or restrictions contained in these regulations on the right of any person to be named as owner, coowner, or beneficiary, savings bonds may be registered in the following forms:

"(a) *Natural persons.* In the names of natural persons in their own right.

• • •

"(2) *Coownership form—two persons (only).* In the alternative as coowners. Example:

'John A. Jones or Mrs. Ella S. Jones.'"

§ 315.20 *General.* (a) No judicial determination will be recognized which would give effect to an attempted voluntary transfer inter vivos of a bond or would defeat or impair the rights of survivorship conferred by these regulations upon a surviving coowner or beneficiary, and all other provisions of this subpart are subject to this restriction. Otherwise, a claim against an owner or coowner of a savings bond and conflicting claims as to ownership of, or interest in, such bond as between coowners or between the registered owner and beneficiary will be recognized, when established by valid judicial proceedings, upon pres-

entation and surrender of the bond, but only as specifically provided in this subpart."

"§ 315.61 *After the death of one or both coowners.* If either coowner dies without the bond having been presented and surrendered for payment or authorized reissue, the survivor will be recognized as the sole and absolute owner. Thereafter, payment or reissue will be made as though the bond were registered in the name of the survivor alone (see Subpart K), except that a request for reissue by him must be supported by proof of death of the other coowner, and except further that after the death of the survivor proof of death of both coowners and of the order in which they died will be required. The presentation and surrender of a bond by one coowner for payment establishes his right to receive the proceeds of the bond, and if he should die before the transaction is completed, payment will be made to the legal representative of, or persons entitled to, his estate in accordance with the provisions of Subpart N. If either coowner dies after the bond has been presented and surrendered for authorized reissue (see § 315.47), the bond will be regarded as though reissued during his lifetime."

APPENDIX B

IN THE DISTRICT COURT OF UPSHUR COUNTY, TEXAS

115TH JUDICIAL DISTRICT

J. W. FREE

v.

JAMES F. BLAND, Individually and as Independent Executor

No. 12,109

Judgment

On the 23rd day of October, A. D. 1959, came on for trial and hearing the Motion for Summary Judgment, heretofore filed herein by Plaintiff, J. W. Free, on July 31, 1959, and all parties appeared in person or by their attorneys and announced ready for trial on said Motion, and the Court, after hearing said Motion, finds that the same has been made in proper form and time, and that proper service thereon has been made, and that all parties are before the Court; and,

The Court, having considered the pleadings on file and the affidavits, finds that they show an absence of any genuine issue as to any material fact, and that judgment should be rendered for Plaintiff, J. W. Free, adjudging him to be the owner of the United States Government Bonds sued for herein; and,

It further appearing to the Court that said bonds were purchased by J. W. Free with the community funds of himself and his wife, Ida Free, now deceased, and were of the value of $87,035.50 at the death of Ida Free, and the Court finds that judgment should be rendered for James F. Bland, as Independent Executor of the Estate of Ida Free, and as sole legatee and devisee under the will of Ida Free, deceased, against the said J. W. Free for the sum of $43,517.75, being one-half of the value of said United States Government Bonds at the death of Ida Free, and that a lien

should be fixed and foreclosed against the proceeds thereof to secure the payment of such sum;

It is, therefore, ORDERED, ADJUDGED AND DECREED by the Court, on this the 23rd day of November A. D. 1959, that the Plaintiff, J. W. Free, do have and recover of and from the Defendant, James F. Bland, Individually and as Independent Executor of the Estate of Ida Free, deceased, judgment for the title to and possession of the United States Government Bonds, more particularly described in Plaintiff's Original Petition, and in Plaintiff's Motion for Summary Judgment; and,

It is FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant, James F. Bland, Individually and as Independent Executor of the Estate of Ida Free, deceased, do have and recover of and from J. W. Free, the sum of $43,517.75, one-half of the value of said United States Government Bonds at the death of Ida Free, and a lien on said one-half of said proceeds is here fixed to secure the payment of this judgment and such lien is hereby foreclosed and Plaintiff and Defendant may have such writs and other processes as are necessary or advisable to enforce this judgment.

The costs herein are taxed against Plaintiff and execution shall issue for the collection thereof.

Plaintiff, J. W. Free, in open Court, duly excepted to said judgment and gave notice of appeal to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas, at Texarkana.

LOONEY E. LINDSEY
Judge Presiding

Endorsed: No. 12,109 J. W. Free vs. James F. Bland, individually and as independent executor. Judgment filed Nov. 23, 1959, Edward Poole, District Clerk, Upshur Co. Texas.

IN THE COURT OF CIVIL APPEALS
FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS

J. W. FREE, *Appellant*,

v.

JAMES F. BLAND, Individually, and as Independent Executor,—*Appellee*.

No. 7223

Appeal from the District Court of Upshur County, Texas

Appellant, J. W. Free, sued appellee James F. Bland, individually and as independent executor of the estate of Mary Ida Free, for recovery of the title to and possession of certain United States Savings Bonds, together with accrued interest thereon, and for a judgment declaring that appellant was the sole owner of said bonds and that appellee had no rights therein.

Both parties are in agreement upon the essential facts of the case. J. W. Free and Mary Ida Free were husband and wife until her death on April 23, 1958. Among other United States Savings bonds purchased during this marriage, from the years 1941 through 1945, were the following co-owner bonds, payable to "Mrs. Mary Ida Free or Mr. John W. Free"; "Mr. John W. Free or Mrs. Mary Ida Free"; "John W. Free or Mrs. Ida Free"; "J. W. Free or Mrs. Ida Free"; and "Mr. John W. Free or Mrs. Ida Free", to-wit: seven "E" bonds of the par value of $1,000.00 each; four "F" bonds of the par value of $1,000.00 each; one "F" bond of the par value of $5,000.00; and seven "F" bonds of the par value of $10,000.00 each. Upon the death of Mary Ida Free, all the co-owner bonds listed above were uncashed, having an aggregate value of $87,035.50. Mary Ida Free's written will, duly probated in Upshur County, Texas, vested the bulk of her estate in her son, James F. Bland, appointing him independent executor, for which he duly qualified.

In appellee's answer and cross action to appellant's suit, he claimed that, because the Frees used community funds to purchase the co-owner bonds listed above, he as the heir to the bulk of Mrs. Free's estate was entitled to one-half the bonds, or, as an alternative, to one-half their value. Appellant filed a motion for summary judgment, with supporting affidavits, to which the appellee filed no reply, nor controverting affidavits. Upon a hearing on appellant's motion, the trial court, on November 23, 1959, rendered judgment for the appellant for the title to and possession of said co-owner bonds, but at the same time ordered that appellee, in equity, ought to recover from appellant one-half of the value of the bonds, and fixed a lien on the proceeds thereof to enforce the judgment.

J. W. Free has appealed. Appellant's first three points of error are based upon the contention that, since the purchase of the co-owner United States Savings Bonds constituted a contract which guarantees, among its other provisions, payment to either surviving co-owner of the bonds in the event of the death of the other, and, since there was no pleading or proof that purchase of the bonds was in fraud of the community property rights of Mary Ida Free, the trial court erred in rendering judgment against the appellant for one-half of the value of the bonds and fixing a lien thereon. In this connection it is appellant's prime position that under the record in this cause he is entitled to the rendition of a judgment in his favor for the full title and possession of the bonds in question and all the fruits thereof, free and clear of any and all claims and liens asserted by appellee.

The regulations of the United States Treasury Department which pertain here (Department Circular No. 530, as revised) provide that "If either co-owner dies without the bond having been presented and surrendered for payment or authorized reissue, the surviving co-owner will be recognized as the sole and absolute owner of the bond and pay-

ment or reissue, as though the bond were registered in his name alone, will be made only to such survivor * * * ."

A few courts in states other than Texas, notably the Louisiana Supreme Court in Slater v. Culpepper (222 La. 962, 64 S.W. (2) 234, 37 A.L.R. (2) 1216), have held this regulation to be merely a method of payment designed for the convenience of the government; also see the case of In the Matter of the Estate of Bertha Q. Allen, deceased, 343 P. (2) 867, Supreme Court of Washington, which follows the Slater v. Culpepper case, but which also recognizes that the Supreme Court of Texas reached the opposite conclusion in Ricks v. Smith, Tex., 318 S.W. (2) 439, and in the course of its opinion in said cause the Supreme Court of Washington stated:

> *"We are not unmindful of the fact that the Supreme Court of Texas, although badly divided, reached the opposite conclusion in Ricks* v. *Smith, 318 S.W. 2d 439.* However, we prefer and adopt the view of the Supreme Court of Louisiana in Slater v. Culpepper, 222 La. 962, 64 So. 2d 234, 237, 37 A. L. R. 2d 1216. * * *"

Appellee relies principally on the Slater v. Culpepper case, supra, the Allen estate case, supra, and the dissenting opinion of Justice Walker in Ricks v. Smith, supra.

The Supreme Court of Texas in Ricks v. Smith, Tex., 318 S.W. (2) 439, divided 6 to 3, with Chief Justice Hickman writing the opinion for the majority. We quote from said majority opinion in part as follows:

> "It cannot be questioned that the opinion of the Court of Civil Appeals follows the rule adopted by a majority of the courts. A number of cases from other jurisdictions are cited in the annotation in 37 A.L.R. 2d 1216 et seq. The annotation is to the Louisiana case of Slater v. Culpepper, 222 La. 962, 64 So. 2d 234, 37 A.L.R. 2d 1216, which case declined to give controlling effect to the Treasury regulations incorporated in the bonds, holding that to do so would nullify community property law of that state. While that case is the only

one cited from a State having community property law, we agree with the Court of Civil Appeals that the purchase of the bonds was by a contract which created a property right,—not merely a method of payment for the convenience of the Treasury Department. There is no sanctity of the community property law above that of other types of law. To give supremacy to Federal regulations no more affects community property law than laws of descent and distribution. The solution as to the property rights of the surviving co-owner of "or" bonds rests in contract, and that contract becomes a part of the bonds. The decisions in this jurisdiction cited in the opinion of the Court of Civil Appeals, while not deciding the precise question here presented, are certainly in harmony with the majority rule followed by that court. We, therefore, approve that holding."

The Court of Civil Appeals' opinion in Smith v. Ricks, Tex. Civ. App. 308 S.W. (2) 941, in specifically refusing to follow the Slater v. Culpepper case stated:

"In further support of their contention, appellees strenuously urge upon the Court the reasoning employed in Slater v. Culpepper, 222 La. 962, 64 So. 2d 234, 37 A.L.R. 2d 1216; Winsberg v. Winsberg, 220 La. 398, 56 So. 2d 730. Both of these decisions follow the holdings of a minority of the courts (see 37 A.L.R. 2d 1216) to the effect that irrespective of the Treasury regulations, which provide that the co-owner named in a United States Savings Bond, when predeceased by the other co-owner, will be recognized as the sole owner, nevertheless, if the bonds were purchased with community funds, the proceeds thereof remain the community property of the husband and wife under the laws so providing of the State of their residence, and the heirs or legatees of the spouse first dying may proceed in reconvention against the estate of the surviving spouse holding or collecting on the bonds for a one-half interest representing the interest of the spouse first dying.

"The majority of the courts, however, follow the reasoning discussed by the late Associate Justice Smedley in Edds v. Mitchell, 143 Tex. 307, 184 S.W. 2d 823,

829, 158 A.L.R. 470, to the effect that the Federal statutes 'authorizing the Secretary of the Treasury to issue the bonds, subject to such terms and conditions as he may prescribe,' and the Treasury regulations under which they are issued are the valid exercise of the constitutional power to 'borrow Money on the credit of the United States' (article 1 § 8, cl. 2), and that 'no state law can vary the terms of the Federal obligations or derogate from their full enforceability'."

In 37 A.L.R. 2d, p. 1223, it is stated:

"Right of surviving co-owner, generally.

§ 3. Majority view.

(a) Generally.

"The rule followed by a majority of the courts, frequently called the 'majority rule,' with respect to rights in United States savings bonds registered in the names of two individuals in the alternative, upon the death of one of the co-owners, is that the surviving co-owner is vested with the sole ownership in such bonds, at least in the absence of fraud or other inequitable conduct on the part of the survivor."

The dissenting opinion of Justice Walker in Ricks v. Smith, supra, joined in by two other Justices, is heavily relied upon by appellee as supportive of his position in this case. However, the majority opinion in Ricks v. Smith, supra, written by Chief Justice Hickman, was agreed to by five other Justices of the Supreme Court, with the Supreme Court dividing 6 to 3 on the case. This court accepts the majority opinion in Ricks v. Smith, supra, as being controlling and decisive.

There was no pleading in the case at bar that the purchase of the bonds in question was in fraud of the community property rights of Mary Ida Free. The bonds in question were bought with the Free's community funds and were made payable to either Mr. Free or Mrs. Free, in conformity with the U. S. Treasury regulations, and a full

twelve years elapsed between the purchase of the bonds and the death of Mrs. Free, and certainly under this record there was no actual fraud shown on the part of the husband in investing community funds in the bonds. It is our further view that under this record the purchase of the bonds and their subsequent passing to the appellant by reason of the unpredictable prior death of Mrs. Free (and under the contractual provisions of the U. S. Treasury regulations) does not in law amount to a constructive fraud upon the estate of Mrs. Free. Also, if Mr. Free had died first and the bonds had passed to Mrs. Free under the contractual treasury regulations we do not think it could be held that a constructive fraud had been committed against Mr. Free's estate by the purchase of the bonds in question under the record in this case.

This court, being an intermediate appellate court, will follow the majority opinions of the Supreme Court of Texas. After careful consideration of the matter it is our considered judgment that the majority opinion of the Supreme Court of Texas in Ricks v. Smith, supra, is controlling and decisive of this case and requires that the judgment of the trial court be reversed and rendered in favor of the appellant awarding him full title and possession of the bonds in question, and the fruits thereof, free and clear of any and all asserted claims and liens of appellees.

The judgment of the trial court is reversed and judgment is here rendered in favor of appellant for the full title and possession of the bonds in question, and all the fruits thereof, free and clear of any and all claims and liens asserted by appellee.

Reversed and rendered.

WM. J. FANNING
Associate Justice

July 12, 1960

IN THE SUPREME COURT OF TEXAS

No. A-8079

JAMES F. BLAND, Individually and as Independent Executor, *Petitioner*

v.

J. W. FREE, *Respondent*

From Upshur County Sixth District

Per Curiam

The opinion of the Court of Civil Appeals, reported in 337 S.W. 2d 805, followed our holding in the case of Ricks v. Smith, 159 Tex. 280, 318 S.W. 2d 439 (1958).

Our action on this application for writ of error was held in abeyance until the case of Hilley v. Hilley should be decided because that case would determine our holding in this cause. Prior to our action on this application for writ of error we decided the case of Hilley v. Hilley, (Vol. 4, The Texas Supreme Court Journal, p. 213, Jan. 28, 1961) in which the case of Ricks v. Smith was overruled. The decision of the Court of Civil Appeals in the present case is in conflict with our opinion in the Hilley case.

Under the discretion given us by Rule 483, Texas Rules of Civil Procedure, we reverse the judgment of the Court of Civil Appeals in this case and affirm the judgment of the trial court.

March 8, 1961

IN THE SUPREME COURT OF TEXAS
AUSTIN

March 8, 1961

No. A-8079

JAMES P. BLAND

v.

J. W. FREE

From Upshur County, Sixth District

Application of petitioner, James W. Bland, Individually and as Independent Executor of the Estate of Ida Free, deceased, for writ of error to the Court of Civil Appeals for the Sixth District having been duly considered, because it is the opinion of the Court that there was error in the judgment of the Court of Civil Appeals, but no error in the judgment of the District Court, it is therefore *adjudged, ordered* and *decreed* that, under Rule 483, Texas Rules of Civil Procedure, the judgment of the Court of Civil Appeals be, and hereby is, reversed and set aside, and the judgment of the District Court be, and hereby is, affirmed, in acordance with the per curiam opinion herein this day delivered.

It is further ordered that respondent, J. W. Free, and the surety on his appeal bond, The Western Casualty & Supply Co., pay all costs in this cause expended and incurred in this Court and the Court of Civil Appeals; that petitioner, James W. Bland, individually and as Independent Executor of the Estate of Ida Free, deceased, have and recover of and from respondent, J. W. Free, and surety, Western Casualty and Supply Co., the costs by him expended and incurred in said courts, and that this decision be certified to both the Court of Civil Appeals for the Sixth Supreme Judicial District and the District Court of Upshur County, Texas, for observance.

IN THE SUPREME COURT OF TEXAS

No. A-7563

PEARL HILLEY, *Petitioner*

v.

GARLAND HILLEY, *Respondent.*

WALKER, Justice.

This is an action for a declaratory judgment to determine whether corporate stock purchased with community funds and issued in the names of the husband and wife "as joint tenants with right of survivorship and not as tenants in common" constitutes community property or belongs to the wife as her separate estate upon the husband's death. The trial court held that the stock is community property, and the Court of Civil Appeals affirmed. 327 S.W. 2d 467. We affirm the judgment of the Court of Civil Appeals.

Mrs. Pearl Hilley, petitioner, and W. E. Hilley were married in 1920 and lived together as husband and wife until his death in 1956. At the time the stock was purchased, W. E. Hilley instructed the broker in petitioner's presence to have the certificates issued in their joint names and in such manner and form that upon the death of either the securities would belong to the survivor. The certificates as delivered to and accepted by the husband contained the language quoted above. They were thereafter kept in a safety deposit box carried in the joint names of the husband and wife, but the contract with the bank contains no survivorship provision with reference to the box or its contents. Each of the parties had a key to the box and was authorized to enter the same at will. W. E. Hilley, who died intestate, was survived by petitioner and Garland Hilley, respondent. The latter is the son of W. E. Hilley by a former marriage.

Article 2580, Tex. Rev. Civ. Stat. 1925,[1] provided that where two or more persons held an estate jointly the interest of one who died before severance would vest in his heirs or legal representatives and not survive to the other joint owners. It was held in Chandler v. Kountze, Tex. Civ. App., 130 S.W. 2d 327 (wr. ref.), that while the relationship of joint tenancy, including the doctrine of survivorship, was thereby abolished in situations where the same would otherwise have been created by law, the statute did not prevent the grantees in a deed from making an effective agreement among themselves that the property conveyed should pass to and vest in the survivor as at common law. A written survivorship contract covering a joint bank account was also upheld in Adams v. Jones, Tex. Civ. App., 285 S.W. 2d 401 (no writ). When Article 2580 was carried into and became Section 46 of the Probate Code, the language of the earlier statute was preserved with the express proviso that "by an agreement in writing of joint owners of property, the interest of any joint owner who dies may be made to survive to the surviving joint owner or joint owners, but no such agreement shall be inferred from the mere fact that this property is held in joint ownership." We assume for the purpose of this opinion that in view of the instructions given to the broker by the husband in the wife's presence, the issuance and acceptance of the stock certificates in their names as joint tenants with right of survivorship constitutes a written agreement within the meaning of the statute.

The Chandler and Adams case did not involve community property or a survivorship agreement between husband and wife, but there are a number of Texas decisions which bear directly or indirectly on the question here presented. In Shroff v. Deaton, Tex. Civ. App., 220 S.W. 2d 489 (no writ), community funds were deposited in a savings and loan as-

[1] Except as otherwise indicated all statutes are referred to by the article number under which they appear in Vernon's Annotated Texas Civil Statutes

sociation pursuant to an optional share subscription contract signed by the husband and wife. It provided that the stock was held by the association for their account as joint tenants with right of survivorship, and the trial court also found as a fact that a short time before his death the husband delivered the pass book to the wife and made a valid gift to her of all his interest in the stock. The court of Civil Appeals expressed the view that the survivorship agreement should be enforced in the absence of fraud, undue influence, mistake or other infirmity, but then pointed out that if this conclusion was erroneous the trial court's finding of a valid gift made shortly before the husband's death would still stand as determinative of the whole case.

An agreement in substantially the same form was considered in Reed v. Reed, Tex. Civ. App., 283 S.W. 2d 311 (no writ), and the court concluded that under our Constitution and statutes the husband and wife have no power to convert their community estate into the separate property of the survivor by such a contract. Three years later in Steffens v. Pollard, Tex. Civ. App., 319 S.W. 2d 447 (affirmed on another ground, but now pending on motion for rehearing, Tex., 343 S.W. 2d 234), the same court refused to follow the Reed case and held on the authority of our decision in Ricks v. Smith, Tex., 318 S.W. 2d 439, 440, that building and loan shares purchased with community funds vested in the wife at her husband's death because of the survivorship provision in the certificates.

The Ricks case involved United States Savings Bonds purchased by the husband with community funds and payable to the husband or wife as co-owners. He predeceased her without having cashed the bonds and after her death a controversy arose as to the ownership of the securities. The Treasury regulations applicable to bonds so issued provide that the surviving co-owner shall be recognized as the sole and absolute owner thereof. In affirming the judgment of the Court of Civil Appeals holding that the bonds vested in the wife at her husband's death, this Court said:

"• • • we agree with the Court of Civil Appeals that the purchase of the bonds was by a contract which created a property right,—not merely a method of payment for the convenience of the Treasury Department. There is no sanctity of the community property law above that of other types of law. To give supremacy to Federal regulations no more affects community property law than laws of descent and distribution. The solution as to the property rights of the surviving co-owner of 'or' bonds rests in contract, and that contract becomes a part of the bonds. The decisions in this jurisdiction cited in the opinion of the Court of Civil Appeals, while not deciding the precise question here presented, are certainly in harmony with the majority rule followed by that court. We, therefore, approve that holding."

The power of the husband and wife to transmute their community property into property held by the spouses in joint tenancy with right of survivorship has been recognized in other community property jurisdictions where the question has arisen. See Annotation 30 A.L.R. 2d 1241. As will be pointed out later, we are inclined to the view that the marital partners also have the power in Texas, but the question to be decided here is whether they may accomplish this result by purchasing securities or other property and having the same conveyed or transferred to them as joint tenants with right of survivorship.

Article XVI, Section 15, of the Constitution, and Article 4614 of the statutes define the wife's separate property as that owned or claimed by her before marriage and that acquired afterward by gift, devise or descent. The husband's separate property is defined in similar terms by Article 4613. Article 4619 provides that all property acquired by either the husband or wife during marriage, except that which is the separate property or either, shall be deemed community property. All marital property is thus either separate or community. If acquired before marriage by any method, or after marriage by gift, devise or descent, it

is separate; otherwise it is community. There are only two exceptions. Property purchased with separate funds is separate, Love v. Robertson, 7 Tex. 6, 56 Am. Dec. 41, and community property partitioned in the manner provided in Articles 4624a and 881a-23, becomes separate property.

The stock involved in this case was acquired by purchase during marriage, and by definition became community property unless the survivorship provision inserted in the certificates with the knowledge and consent of the husband and wife converted the same into the latter's separate property upon her husband's death. The parties clearly intended that result, but as pointed out in Kellett v. Trice, 95 Tex. 160, 66 S.W. 51, 54, "the question whether particular property is separate or community must depend upon the existence or nonexistence of the facts, which, by the rules of law, give character to it, and not merely upon the stipulations • • • that it shall belong to one class or the other. Thus, when one spouse passes to the other by gift his or her title to separate property, it could not become the community property of both, because the law declares that property so acquired shall be the separate property of the donee; and a gift by the husband to the wife of his interest in community property would become the separate property of the donee for the same reason. And so property acquired in the name of either spouse during marriage, otherwise than by gift, devise or descent, or in exchange for separate property, would, by force of the statute, be community property. It is true that in the acquisition or afterwards the husband may give to the wife all his interest in the property, and thus, by gift, make it hers; but at last this would be true only because the facts defined in the law exist, and the separate right is derived through a gift, the husband having full power over the community estate." See also Tittle v. Tittle, 148 Tex. 102, 220 S.W. 2d 637. In Cox v. Miller, 54 Tex. 16, it was said that while the husband may make a direct gift of his separate property or the community estate to his wife, the spouses cannot by a mere agree-

ment change the character and nature of the rights and interest in property owned or acquired by them from that prescribed by law.

The survivorship agreement made by petitioner and her husband is not effective as a partition under Article XVI, Section 15, because it is not subscribed and acknowledged by both spouses as required in Article 4624a. It also is clear that the securities did not pass to petitioner by devise or descent, and no interest or right therein was acquired with her separate funds. There is nothing to suggest that Mr. Hilley made a gift *in praesenti* of all his interest in the stock. The parties did not intend that the same should immediately pass to petitioner as her separate property. Instead it was agreed that the securities would be held by the spouses as joint owners while both lived and then vest in the survivor upon the death of either.

If their contract is to be regarded as an agreement that the stock would remain community property as long as both parties lived and then pass to and become the separate property of the survivor, it clearly contravenes Article 4610. Persons intending to marry are there prohibited from making any agreement which would alter the legal order of descent. While the literal wording of the statute applies only to ante-nuptial agreements, the courts have extended its terms to post-nuptial agreements as a matter of public policy. See Weidner v. Crowther, 157 Tex. 240, 301 S.W. 2d 621, and authorities there cited. Even if we disregard Article 4610 or hold that its provisions do not apply to survivorship agreements, the title which petitioner asserts had its inception in the contract she made with her husband and is therefore deemed to have been acquired during marriage for the purpose of determining its separate or community status. Golden v. Alexander, 141 Tex. 134, 171 S.W. 2d 328; Creamer v. Briscoe, 101 Tex. 490, 109 S.W. 911, 17 L.R.A., N.S., 154, 130 Am. St. Rep. 869; MacRae v. MacRae, Tex. Civ. App., 144 SW. 2d 320 (wr. ref.). If

petitioner now owns the stock as her separate property, it must be on the theory that when the same was purchased she acquired as a gift from her husband the right or interest therein which ripened into absolute ownership upon his death.

A gift is a transfer of property made voluntarily and gratuitiously. When an *inter vivos* transfer is made to either or both of the spouses during marriage, the separate or community character of the property is determined by looking to the consideration given in exchange for it. Any right, title or interest acquired for a valuable consideration paid out of the community necessarily becomes community property, and this is so whether the transfer be made by some third person or by one of the marital partners to the other.

The parties here did not merely agree that petitioner would own the securities in event she survived; it was also stipulated that the stock would vest in the husband if petitioner died first. Prior to the making of this agreement, each spouse owned a community one-half interest in the money used to purchase the stock. If the agreement had not been made, each would have acquired a similar interest in the stock with all of the rights and powers incident thereto. Each would have had the power to dispose of his or her interest by will or to permit the same to pass and vest in accordance with the statutes of descent and distribution. Under the terms of their contract if the same is effective, each relinquished at least some of the legal incidents of community ownership and received in lieu thereof the right to become absolute owner in the event he or she survived the other contracting party. If they became joint tenants, it is by virtue of a transaction in which each surrendered a community interest in exchange for the interest of a joint tenant. Aside from the fact that their life expectancies might not be the same, the right or interest acquired by the husband is no less valuable than that received by the

wife. The detriment to the husband is no greater than that suffered by the wife. There is no gift then but an attempted transfer of a survivorship right or interest from each spouse to the other for a valuable consideration. Since the consideration paid by each is derived from the community estate, the right or interest which each expected to acquire necessarily remains part of that estate.

In this respect their agreement is not materially different from the deed involved in Pevehouse v. Lubbock National Bank, Tex. Civ. App., 79 S.W. 2d 1107, 1108 (no writ). Community land was conveyed by the husband to his wife in consideration of her relinquishing all rights to other community property. It was held that the land which the deed purported to convey remained the community property of the parties, and the court said:

> "This instrument does not evidence a gift by the husband to the wife, since 'gift' means a voluntary transfer of property by one party to another without any consideration. If there is a consideration for the transfer, the rights of the parties to the transaction are contractual and determined by the law of contracts. Kearse v. Kearse et al., Tex. Com. App., 276 S.W. 690, 691; Brito v. Slack, Tex. Civ. App., 25 S.W. 2d 881. • • • This instrument constituted an agreement between the husband and wife to divide or partition their community property and create therefrom a separate estate for each, which, so long as they continue their marital relation, is not authorized by law."

Although supremacy of Federal regulations was mentioned in the majority opinion, the holding of the Ricks case is based on the premise that a husband who uses community funds to purchase U. S. Savings Bonds and has the same issued in the names of the spouses as co-owners thereby makes a contract with the government for the benefit of a third party, the wife. It stems from Edds v. Mitchell, 143 Tex. 307, 184 S.W. 2d 823, 158 A.L.R. 470, where "p. o. d." bonds purchased by a life tenant with power of disposition

were likened to a policy of life insurance. The opinion in the Edds case states that a life insurance policy for the benefit of another is perhaps the best illustration of a contract for the benefit of a donee beneficiary, and that the situation of the parties to the bonds then under consideration was substantially the same as that of the parties to an insurance policy.

After further consideration of the question, we are convinced that the Ricks decision cannot be reconciled with the provisions of our Constitution and statutes. The "contract" which a purchaser of bonds makes with the government does not simply provide that the securities shall become the property of the other co-owner at the purchaser's death. It stipulates that if either co-owner dies, the surviving co-owner shall be recognized as sole and absolute owner. This is nothing more than a survivorship agreement although the contracting parties are usually the purchaser and the government rather than the two co-owners. Under the provisions of the Probate Code, the interest of a joint owner who dies may be made to survive only by agreement of the joint owners in writing. As applied to community property, the statute means that the interest of one spouse cannot survive to the other except by contract of the husband and wife. Such an agreement when made is for the mutual benefit of the contracting parties, and there is no semblance of a gift even though some third party may also agree to recognize the survivor as absolute owner. The fact that a third person is involved in the transaction, either as grantor, transferor, borrower, issuing corporation, depository, or otherwise, is thus of no legal consequence. Dealings with a third party cannot give rise to a survivorship interest unless the joint owners have the power to and do make an effective written contract so providing. There is no basis for saying that the spouses have even attempted to make such an agreement when one buys government bonds without the knowledge or consent of the other.

It is clear that the Federal regulations do not override our local laws in matters of purely private ownership where the interests of the United States are not involved. Bank of America National Trust & Savings Ass'n v. Parnell, 352 U.S. 29, 77 S. Ct. 119, 1 L.Ed. 2d 93. We might continue to treat "or" bonds purchased with community funds as though they were legally analogous to a life insurance contract and look to the insurance decisions for precedents in determining the ownership of such securities after the death of one co-owner. This or some equally unrealistic approach seems to be the only alternative to overruling the Ricks case if title is to vest in the husband when the wife dies first. Before Article 23 was amended to provide that the word "property" as used in the statutes would include life insurance policies and the effects thereof, it was generally held that in the absence of fraud the proceeds of a policy on the life of one spouse became the property of the designated beneficiary although the premiums were paid with community funds. This was so even where the policy insured the wife's life in favor of her husband. The courts reasoned that an insurance contract is not property, and that the policy proceeds paid to the husband after the death of the insured wife were not acquired during marriage and therefore became his separate property. It was said that the husband as manager of the community was authorized to purchase the contract with community funds and that there should be no interference with his statutory right of control unless it was exercised in fraud of the wife's rights. See Martin v. McAllister, 94 Tex. 567, 63 S.W. 624, 56 L.R.A. 585; Volunteer State Life Ins. Co. v. Hardin, 145 Tex. 245, 197 S.W. 2d 105, 168 A.L.R. 337; Warthan v. Haynes, 155 Tex. 413, 288 S.W. 2d 481. On the other hand the cash surrender value of a policy purchased with community funds was regarded as community property. Womack v. Womack, 141 Tex. 299, 172 S.W. 2d 307. And the policy proceeds were treated as community property for inheritance tax purposes. Blackmon v. Hansen, 140 Tex. 536, 169 S.W. 2d 962.

The decided cases demonstrate the difficulties that were encountered once the courts refused to recognize the property aspects of life insurance. There is no material difference between "or" bonds and other types of property, and any departure from established principles of community property law in dealing with the same will almost certainly lead to confusion and uncertainty as well as inconsistent or undesirable results in particular cases. The insurance decisions suggest that the wife's estate can be protected when she has been defrauded by her husband, but it will usually be difficult or impossible to establish actual fraud and we do not anticipate that constructive fraud will be defined with such clarity as to provide a satisfactory standard that will insure even reasonably fair treatment of the marital partners and their estates in the various situations that may arise. These considerations lead us to the conclusion that the Ricks case should be overruled, and we will not follow the same where "or" bonds are purchased with community funds and issued in the names of the spouses as co-owners. See Slater v. Culpepper, 222 La. 962, 64 So. 2d 234, 37 A.L.R. 2d 1216; In re Allen's Estate, 54 Wash. 2d 616, 343 P. 2d 867. This does not require that the holdings of Chamberlain v. Robinson, Tex. Civ. App., 305 S.W. 2d 817 (wr. ref.), or McFarland v. Phillips, Tex. Civ. App, 253 SW. 2d 953 (wr. ref. n. r. e.), be disturbed. Community property apparently was not involved in those cases, and there seems to be no legal impediment to recognition of a contract for the benefit of a third party when the bonds are acquired with the purchaser's separate funds The case in which bonds are purchased by one spouse with community funds and issued in his or her name and that of some third person as co-owners will be decided when it arises.

We do not think the Legislature in amending Article 2580 intended to modify other statutes and provide that separate ownership might result from a transaction which does not meet the requirements of Articles 4613, 4614, 4619, 4624a and 881a-23. In the first place, any such attempt could not

be effectual in so far as the wife is concerned. Under the Constitution, property which she acquires during marriage in any manner other than by gift, devise, descent, purchased with separate funds, or partition as authorized by Articles 4624a and 881a-23 does not and cannot be made to constitute her separate property. Arnold v. Leonard, 114 Tex. 535, 273 S.W. 799. In the second place and while we do not attempt to decide the question here, it seems that our Constitution and statutes already provide a method whereby the spouses may arrange for property which once constituted part of their community estate to vest in the survivor if the necessary formalities are observed. Community property may be partitioned in the manner provided in Article 4624a, and the portion set apart to each spouse thereupon becomes his or her separate estate. Articles 4614 provides that the wife, if she is at least twenty-one years of age and elects in the manner set out therein, shall have the sole management, control and disposition of her separate property, and in connection therewith may contract without the joinder of her husband. If the wife thus acquires power to contract with the husband regarding her separate estate, there apparently is no legal reason for saying that they cannot make an effective survivorship agreement covering property separately owned by either or both. Under such circumstances the survivorship right or interest acquired by each at the time of making the contract would be by gift or purchase for a consideration paid out of separate property.

An amicus curiae brief suggests that the parties should be presumed to have intended to take any intervening steps that might be necessary to accomplish the result they desired. We are urged to say that Mr. Hilley first gave the community funds to petitioner and that the latter then used her separate property thus acquired to purchase the stock and create a joint tenancy with her husband. This argument, which has already been answered by the opinion in

Kellett v. Trice, supra, implicitly recognizes that the agreement in the present case can be upheld only by resorting to legal fiction. A transaction in which each party receives something of value for that which is relinquished has none of the earmarks of and cannot be given the same legal effect as successive and unrelated gifts. We agree with the Court of Civil Appeals that instead of becoming petitioner's separate property upon her husband's death, the stock passed and vested in accordance with the laws of descent and distribution applicable to community property. The question whether an issuing corporation will be protected when it deals with the survivor without notice that the stock was purchased with community funds is not presented or decided.

The judgment of the Court of Civil Appeals is affirmed.

Griffin, Culver and Norvell, JJ., dissenting.

Steakley, J., not sitting.

Norvell, Justice (dissenting).

I agree with the Court that as a logical proposition Ricks v. Smith, Tex., 318 S.W. 2d 439, 440, should be overruled if the judgment of the Court of Civil Appeals is to be affirmed.

In the Ricks case this Court held that "the purchase of the (United States Savings) bonds was by a contract which created a property right,—not merely a method of payment for the convenience of the Treasury Department. There is no sanctity of the community property law above that of other types of law. To give supremacy to Federal regulations no more affects community property law than laws of descent and distribution. The solution as to the property rights of the surviving co-owner of 'or' bonds rests in contract, and that contract becomes a part of the bonds."

In the present case the securities in dispute (mutual fund certificates) were issued to "W. E. Hilley and Pearl Hilley

as joint tenants with full right of survivorship and not as tenants in common."

However, instead of overruling the Ricks case, I would reverse the judgment of the Court of Civil Appeals as being contrary thereto.

When writing in opposition to a decision which overrules a case which is considered sound there is not much to be said other than that one regrets the departure of the departed. Ricks v. Smith speaks for itself. In my opinion it was supported in principle by Edds v. Mitchell, 143 Tex. 307, 184 S.W. 2d 823, 158 A.L.R. 470; Shroff v. Deaton, Tex. Civ. App., 220 S.W. 2d 489, no wr. hist., and McFarland v. Phillips, Tex. Civ. App., 253 S.W. 2d 953, wr ref. n. r. e, and is in accord with the weight of American authority on the point. In the annotation following the report of Slater v. Culpepper, 222 La. 962, 64 So. 2d 234 in the American Law Reports (37 A.L.R. 2d 1216) it is said that:

> "The rule followed by a majority of the courts, frequently called the 'majority rule', with respect to rights in United States savings bonds registered in the names of two individuals in the alternative, upon the death of one of the co-owners, is that the surviving co-owner is vested with the sole ownership in such bonds, at least in the absence of fraud or other inequitable conduct on the part of the survivor." 37 A.L.R. 2d 223.

Texas is listed as one of the states following the majority rule along with California, another community property state.

One may well rest his argument upon the authorities mentioned along with the observation suggested in one of the briefs relating to the question before us:

Under modern social conditions there now exists a true family community wherein the wife upon the death of the husband succeeds to the head of the family and is conceded the competency to handle the family finances. The holding

of securities under the contractual relationship here involved offers a means for the modern family to pool the husband's and wife's resources and keep them in a flexible state for use during the marriage and at the same time providing for unfettered passage of title of the whole to the surviving head of the family unit. There is no public policy upon which such an arrangement could infringe. In fact, public policy should be to foster such procedures.

Mr. and Mrs. Hilley purchased shares in the issuing corporations which carried with them certain contract rights which accrued to them as certificate holders. The rights which they acquired by contract and purchase were similar to those held by owners of the common law estate of joint tenancy, notably the right of survivorship. While at common law agreements attempting to "alter the legal orders of descent" were not sanctioned, Protzel v. Schroeder, 83 Tex. 684, 19 S.W. 292, 294, it was never considered that agreements giving rise to joint tenancies were comprehended by the rule. The right of survivorship arose with the purchase and acquisition of the title, and such expectancies as the heirs of either of the parties may have had were deflected, so to speak, by the contractual consequences incident to and a part of the property rights acquired. While the contractual interest to the property acquired was not a technical common law estate, the right of survivorship was clearly expressed and that is the matter with which we are here concerned. The right of the survivor to take the property upon dissolution of the marriage by death had its genesis in and arose from the contract of purchase. To receive and accept property under such arrangement is no more violative of the community property scheme of things than the purchase of a life estate with community funds would be. For property to be community it is not essential that it be held in fee simple. It is not required that the interest of the person who dies first should pass to his or her heirs, absent a valid testamentary provision. The clear import of the Ricks case supports

these statements. I believe them to be sound and in accordance with an enlightened policy which in the absence of fraud would allow persons to freely contract and choose the species of property which they wish to possess. Accordingly, I dissent from the Court's action in overruling Ricks v. Smith.

I am further in disagreement with the Court upon its holding that an agreement between husband and wife complying with the provisions of Article 46 of the Probate Code is insufficient as a basis for a right of survivorship in property purchased with community funds.

In Chandler v. Kountze, Tex.Civ.App., 130 S.W.2d 327, 328, wr. ref., it appeared that Texas Land & Cattle Company conveyed various tracts of land to Charles T. Kountze and Luther L. Kountze "as joint tenants, with all the rights of such tenants in common law including the right of survivorship."

The Court of Civil Appeals held that:

> "While the wording of Article 2580 indicates a legislative intent to abolish the relationship of joint tenancy where it would otherwise have been created by law, including the common-law doctrine of survivorship, there is nothing in the subject matter of the act which would, in our opinion, justify the presumption that the legislature intended to thereby prevent the parties to a contract, a will, or a deed of conveyance, from providing among themselves that the property in question should pass to and vest in the survivor as at common law."

After a rather exhaustive consideration of the American authorities, the Court concluded that the provisions relating to survivorship were not void as being in contravention of the statute, "but that such provisions are valid and enforcible as the clearly expressed intention and desires of the contracting parties."

This Court refused a writ of error in the case and its

soundness, as applied to the factual situation then before the Court, has never been questioned.

The substance of Article 2580 now appears in Article 46 of the Probate Code, viz.:

> "Where two or more persons hold an estate, real, personal, or mixed, jointly, and one joint owner dies before severance, his interest in said joint estate shall not survive to the remaining joint owner or joint owners, but shall descend to, and be vested in, the heirs or legal representatives of such deceased joint owner in the same manner as if his interest had been severed and ascertained. *Provided, however, that by an agreement in writing of joint owners of property, the interest of any joint owner who dies may be made to survive to the surviving joint owner or joint owners, but no such agreement shall be inferred from the mere fact that the property is held in joint ownership.*"

The proviso above italicized was added in 1955 at the time of the adoption of the Probate Code.

In adopting this proviso, the Legislature undoubtedly had in mind the decision in Chandler v. Kountze and legislated in regard thereto. The wording of the proviso is that joint owners may provide by an agreement in writing that the interest of any joint owner who dies may be made to survive to the surviving joint owner. It is not here disputed that at the time of the inception of title, there was an agreement providing that the mutual fund shares involved should be held subject to the "full right of survivorship" of the surviving joint owner. It seems therefore that we have direct statutory authority for the issuance of the form of security involved in this case.

It is the position of the Court that while the holding of Chandler v. Kountze and the proviso of the statute above quoted may apply to properties purchased by husband and wife using monies from their separate estates, they cannot be applied to properties purchased with community funds. It is contended that a husband and wife must first partition

community property, as permitted by Article 16, § 15 of the Constitution and Article 4624a, Vernon's Ann.Tex.Stats., before they may purchase securities of the type here involved, namely, those carrying a valid contractual provision for the right of survivorship.

The Court's holding seems to be that the use of community funds to purchase survivorship contracts in some way interfere with the provisions of Article 4610, Vernon's Ann.Tex.Stats., which expressly proscribes pre-nuptial agreements altering the legal orders of descent and by implication render invalid post-nuptial agreements which would have that effect.

Despite the provisions of Article 4610, this Court has held that mutual wills based on *contract* are enforceable in this State. In Weidner v. Crowther, 157 Tex. 240, 301 S.W.2d 621, 625, this Court said:

> "The mutual will of Hugo and Sophie Weidner was not rendered invalid by Article 4610. Of equal dignity with Article 4610 is the statute which permits every person, competent under the provisions thereof, to dispose of his property by will, Texas Probate Code, sec. 57, V.A.T.S. Article 8281, Revised Civil Statutes of Texas 1925, repealed by adoption of the Probate Code."

See, also, Graser v. Graser, 147 Tex. 404, 215 S.W.2d 867.

Can it not be said with equal logic that a written agreement providing for contractual survivorship with reference to property is not rendered invalid by Article 4610? Of equal dignity with Article 4610 is the statute which permits joint owners of property by agreement in writing to provide that the interest of any joint owner who dies may be made to survive to the surviving joint owner or joint owners. I believe it can and would so construe the statutory enactments involved. On this basis as well as the rule of Ricks v. Smith, survivorship agreements should be upheld.

For the reasons set forth, I respectfully dissent from the order affirming the judgment of the Court of Civil Appeals.

GRIFFIN and CULVER, JJ., join in this opinion.

January 25, 1961.